

ARIZONA SILICA SAND CO.

IBLA 95-468

Decided April 22, 1999

Appeal from a decision of the Arizona Deputy State Director, Bureau of Land Management, affirming stipulations to a mining plan. AZ 14-20-0603-8992.

Set Aside and Remanded.

1. Regulations: Applicability

A sand and gravel mining permit which provides for the applicability of regulations "now or hereafter in force" incorporates future regulations as current permit terms as they become effective, even though such regulations may place additional obligations or burdens on the permittee.

2. Indians: Mineral Resources: Mining: Generally—Mining and Reclamation Plan: Generally

BLM may condition the approval of a mining plan on the acceptance of stipulations designed to ensure proper reclamation where such stipulations are reasonable and reflect consideration of Indian interests. However, the decision to require particular stipulations must be supported by the record even when they are based on the recommendations of the surface management agency and the tribe involved.

3. Indians: Mineral Resources: Mining: Generally—Mining and Reclamation Plan: Generally

Under its general authority to approve mining and reclamation plans on Indian lands, 43 C.F.R. § 3592.1, BLM may require the permittee to agree to comply with various stipulations if they are shown to be necessary to meet the reclamation goal of the plan.

APPEARANCES: Jennifer Brooks Gavilondo, Esq., Heidi L. McNeil, Esq., Phoenix, Arizona, for Appellant.

## OPINION BY ADMINISTRATIVE JUDGE PRICE

Arizona Silica Sand Company (ASSC) has appealed an April 12, 1995, Decision of the Deputy State Director, Resource Planning, Arizona, Bureau of Land Management (BLM), affirming certain stipulations required as a condition precedent to the approval of a mining and reclamation plan (plan or mining plan). In his letter of July 25, 1994, the BLM Assistant District Manager, Division of Mineral Resources, Phoenix District, conditioned approval of ASSC's mining plan upon its acceptance of five stipulations. ASSC appealed the imposition of three of those stipulations to the State Director. In affirming, the Deputy State Director concluded that the Authorized Officer properly could condition approval of ASSC's mining plan on the company's agreement to fully comply with the stipulations stated in the July 25, 1994, letter.

ASSC has operated a silica sand mine on the Navajo Reservation since 1966 under Bureau of Indian Affairs (BIA) Sand and Gravel Mining Permit Contract No. 14-20-0603-8992 (permit). The permit was issued on April 7, 1966, and approved by BIA on August 10, 1966, for 640 acres, in sec. 29, T. 22 N., R. 29 E., Gila and Salt River Meridian. In November 1982, ASSC agreed to release 130 acres of the permit acreage located in the S $\frac{1}{2}$ S $\frac{1}{2}$  of sec. 29 to the Navajo Nation for the construction of housing. Approximately 40 of the 510 acres now covered by the permit will be disturbed by current and future mining. (Environmental Assessment (EA) No. AZ-020-IND-93-01 at 5.) The remaining 470 acres have been reclaimed or were not disturbed by past mining. The premining use of the land was as grazing for sheep and goats. (EA at 4, 5.) The terms of the permit authorize ASSC to mine silica sand for a term of 5 years from the date of approval and for as long thereafter as silica sand is produced in paying quantities. The sand is valuable as a specialty sand and is sold chiefly as a hydrofac proppant to the petroleum industry in the San Juan Basin. (EA at 4.)

Issuance of leases and permits for extraction of minerals on Tribal and allotted lands is authorized under the Act of May 11, 1938, 25 U.S.C. § 396a-g (1994), the Act of March 3, 1909, as amended, 25 U.S.C. § 396 (1994), and the implementing regulations found at 25 C.F.R. Part 211 (tribal lands) and Part 212 (allotted lands). <sup>1/</sup> Surface mining and reclamation of Indian lands are subject to regulations found at 25 C.F.R. Part 216, which are administered by BIA. However, BLM is authorized to manage minerals on Indian lands, including the approval of mining plans, under Secretarial Order No. 3087, Amendment No. 1, February 7, 1983. <sup>2/</sup> Thus, mining operations on tribal and allotted lands are subject to regulation as outlined in 43 C.F.R. § 3590.0-7.

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<sup>1/</sup> The permit was issued under the authority of 25 C.F.R. Part 171, currently designated as 25 C.F.R. Part 211.

<sup>2/</sup> The regulations were revised in 1996 to include 25 C.F.R. § 211.4, which specifies BLM's authority and responsibility in regard to tribal lands, including approval of mining and reclamation plans for tribal lands. The regulations further provide that BLM's regulations supplement those of the BIA. ASSC does not question BLM's authority to approve mining plans.

The relationship among BLM, BIA, and the Minerals Management Service (MMS) with respect to the administration and management of mineral lease activities relating to Indian mineral resources is governed by a Memorandum of Understanding (MOU) executed by the parties in August and September 1991, as revised in October 1994. Attachment A to this MOU further defines the relative responsibilities of the parties. The responsibility of approving reclamation plans rests with BLM, but BLM is required to obtain BIA's concurrence prior to approval of the operator's plan. (Attachment A at A-12.) While the record does not contain BIA's written approval of the plan with the stipulations, the stipulations were recommended by BIA, and the record shows that BLM did obtain the concurrence of the Navajo Nation. (Conversation Record of July 25, 1994.)

[1] An approved mine and reclamation plan for mining operations on Indian lands is required by 25 C.F.R. § 216.7 and 43 C.F.R. § 3592.1. ASSC had been operating without an approved plan because it began mining at the site before such a plan was required by the regulations. Even so, section 8 of ASSC's permit states that "[t]he Permittee agrees to abide by and conform to any and all regulations of the Secretary of the Interior now or hereafter in force relative to such permits \* \* \*." This Department has long held that the intent of the language "now or hereafter in force" is to incorporate future regulations into existing permit terms when they become effective, even though such future regulations may place additional obligations or burdens on a permittee. Asarco, Inc., 141 IBLA 269, 273 (1997), AMCA Coal Leasing, Inc. (On Reconsideration), 114 IBLA 246 (1990); Gilbert V. Levin, 64 I.D. 1 (1957). Thus, the requirement of an approved mining and reclamation plan in 25 C.F.R. § 216.7 and 43 C.F.R. § 3592.1 applies to ASSC's permit.

ASSC submitted its first mining plan on January 4, 1974, thus initiating the long saga of inspections, inter- and intra-agency review and comment on ASSC's plan submissions, jurisdictional transfers, <sup>3/</sup> and compliance issues that document the effort to obtain an approvable mining and reclamation plan. By letter dated September 10, 1979, USGS notified ASSC that it was operating without a mining plan, in violation of applicable regulations at 30 C.F.R. § 231 and 25 C.F.R. § 177, and requested submission of a plan within 90 days of receipt thereof. MMS informed ASSC on January 27, 1982, that there were deficiencies in the mining plan and that additional information was needed for those portions of the plan dealing with reclamation and revegetation. Specifically, the letter stated: "5. The reclamation and revegetation portion of the plan needs

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<sup>3/</sup> At that time, responsibility for approval of the plan rested with the Conservation Division of the United States Geological Survey (USGS). That authority was transferred to the MMS, when it was established by Secretarial Order No. 3071, dated Jan. 19, 1982. On Dec. 3, 1982, responsibility for onshore minerals functions was transferred to BLM by Secretarial Order No. 3087, which was amended on Feb. 7, 1983, to specifically provide that BLM was to approve mining plans on Indian lands.

to be expanded. The plan does not state how new growth will be promoted in the abandoned pit areas and does not state to what minimum thickness topsoil would be spread over the disturbed area." (January 27, 1982, Letter from BLM to ASSC, at 2.) ASSC provided the requested information to MMS on February 8, 1982. By memorandum dated April 15, 1982, the Navajo Nation provided its comments on the proposed mining plan, as supplemented by ASSC in February 1982. Seeding and mulching are identified as sequential steps under the heading Integrated Reclamation in section 6A, but neither the seed mix nor the mulching material are specified, and there is no mention of fencing.

On April 21, 1989, BLM informed ASSC that the additional information it had provided to MMS on February 8, 1982, did not meet regulatory requirements. BLM thus requested a further submission, including information regarding the seed mix to be used in reclamation. In response, ASSC provided a mining plan on July 25, 1989, which superceded the 1974 plan, as it had been revised in 1982. There is no mining plan bearing a July 1989 date in the record, but it apparently contained the first mention of a specific seed mixture, evidently a dryland pasture mix. (July 27, 1989, Inspection Report.)

By letter dated August 8, 1989, BLM provided comments on the mining plan. Among other things, BLM mentioned seeding in the form of a suggestion that ASSC contact BIA "regarding effective techniques for using topsoil and application of seed." (Letter from BLM Assistant District Manager to ASSC dated August 8, 1989, at 1.) The Navajo Nation provided its comments on August 10, 1989. Neither seeding nor a seed mixture was mentioned by the tribe. On September 5, 1989, BLM requested yet more information, with the comment that "topsoil stockpiles should be seeded and stabilized to prevent loss due to wind and water erosion." (September 5, 1989, letter from BLM Assistant District Manager to ASSC dated September 5, 1989, at 2.)

Additional information dated September 26, 1989, was provided to BLM, and again, the case file does not contain a copy of what was provided, but it apparently referred to a dryland pasture mix. (Letter from BLM Assistant District Manager to Linkon, Navajo Nation, dated November 13, 1989, at 1.) On July 18, 1990, representatives from BLM, the Navajo Nation, and BIA met to discuss the proposed mining plan. This meeting was memorialized in a memorandum dated September 4, 1990, in which, evidently for the first time, the question of fencing arose. Specifically, in paragraph 2 at 2, under the heading Reclamation, the memorandum noted that the group had commented that, among other things, "topsoil should be stored to minimize loss by fencing and mulching the stockpiles." In addition, in the same para-graph the memorandum stated the following: "The fencing of areas reseeded during reclamation for one to two years was suggested, provided this did not interfere with grazing permittees." As indicated by a memorandum from the BLM Assistant District Manager to the Navajo Nation dated September 6, 1990, at this point, there were approximately 100 disturbed acres on the permit. In June 1993, BLM again requested additional information, and ASSC again complied with the request.

BLM prepared the EA for the mining plan, which was approved by the Phoenix District Office on May 13, 1994. Copies of the EA and Decision Record (DR), which included a mining plan dated June 27, 1994, and the stipulations, were then sent to the Navajo Nation Minerals Department for review and comment. The Navajo Nation provided a number of comments in a letter dated June 13, 1994, including the comment that reclamation would never be successful "if grazing and access to the reclaimed areas are not controlled." Finally, on July 25, 1994, BLM approved the mining plan subject to ASSC's agreement to comply with the five stipulations, and as noted, ASSC challenged the validity of three of the stipulations in an appeal to the State Director.

In that appeal, ASSC objected to Stipulation No. 3, which required that the disturbed land be reseeded with a specific native grass mix recommended by the BIA. ASSC argued that the seed species should be left to its discretion. (September 20, 1994, appeal to State Director at 4, 5.) ASSC also challenged the need for Stipulation No. 4, which requires that a mulching material shall be applied to all areas after they have been seeded. That stipulation requires a mulch of native grass hay, relatively free of viable weeds and grain or grass seeds, to be "uniformly placed over the seeded surface at an application rate of two tons per acre and anchored by crimping." (DR at 1.) As stated, ASSC believes the requirement to mulch is unnecessary, because ASSC contends that it has successfully reclaimed disturbed areas without using it. Stipulation No. 5 requires the seeded areas to be "fenced to protect them from grazing by livestock for a period of two to four years after establishment of vegetation." ASSC expressed some willingness to fence a certain 20-acre area, which reportedly contains a prehistoric archaeological site, for 1 to 2 years, but objected to fencing the entire area for up to 4 years. (Appeal to State Director at 6.) On April 12, 1995, BLM rendered its Decision affirming the imposition of the stipulations. ASSC appealed from that Decision to this Board.

In its Statement of Reasons (SOR), ASSC states it obtained all the information utilized by BLM in reaching its decision to include these three stipulations in the mining plan pursuant to the Freedom of Information Act (SOR at 3), 5 U.S.C. § 552 (1994), and that the documents received from BLM do not reveal any reason or predicate showing why these stipulations are necessary to successfully reclaim disturbed acreage. (SOR at 4.) Additionally, although the BLM Decision recites that the correct procedures were followed, ASSC contends that it does not indicate that the Deputy State Director examined the merits of the stipulations. Thus, ASSC maintains that the stipulations first should be thoroughly examined to ascertain whether they are reasonable before it is required to agree to them.

With respect to Stipulation No. 3, ASSC asserts that BLM is requiring use of a seed mix based on a BIA recommendation that is not supported by evidence that the recommended seed mix is superior or will better adapt to the area than the seed mix used by ASSC. ASSC further asserts that some

of the required seed species are prohibitively expensive and not readily available, and that it has successfully reclaimed areas with a native grass mix in the past. Therefore, it contends, requiring the seed mix specified in Stipulation No. 3 is unreasonable.

Regarding Stipulation No. 4, ASSC argues that mulching is also an unreasonable and unnecessary requirement, because it has successfully reclaimed in the past without using mulch.

ASSC further contends that there is no support in the regulations for the fencing requirement in Stipulation No. 5. It argues that the regulations cited by BLM as support for the stipulation, 43 C.F.R. § 3592.1(c)(10) and 25 C.F.R. § 211.24, <sup>4/</sup> do not provide any such support. (SOR at 5.) ASSC therefore concludes that BLM has failed to provide any reason or basis for these three stipulations. (SOR at 4.)

[2] BLM's authority to impose protective stipulations has been upheld where the record shows that they are the result of a reasoned analysis of all pertinent factors, with due regard for the public interest, and that they reflect a reasonable means to accomplish a proper Departmental purpose. Draco Mines, Inc., 75 IBLA 278, 282 (1983).

The stipulations apparently arose from comments by BIA in a letter noting deficiencies it found in the 1989 mining plan. (Letter of May 14, 1993, from Acting Area Director, BIA Navajo Office to BLM.) However, while BLM is required to consult with any other agency involved (43 C.F.R. § 3592.1(a)) and to obtain the concurrence of BIA (MOU, Attachment A at A-12), ultimately it is BLM's responsibility to approve the reclamation plan, which means that BLM is required to examine and consider the merits of the proposed plan and whether and to what extent stipulations are reasonably necessary to achieve reclamation goals. Furthermore, it is BLM's responsibility to ensure that the written decision discloses the basis for its conclusions, and that the decision is supported by the administrative record thereof. George W. Philip, 141 IBLA 195, 197 (1997); U.S. Oil and Refining Co., 137 IBLA 223, 232 (1996); Kanawha & Hocking Coal, 112 IBLA 365, 368 (1990). Thus, we have held that the recipient of a decision is entitled to a reasoned and factual explanation which provides a basis for understanding and accepting the decision, or alternatively, for appealing and disputing it before the Board. Pittsburg & Midway Coal Mining Co. v. OSMRE, 140 IBLA 105, 109 (1997), and cases cited therein. A decision is properly set aside and remanded if it is not supported by a case record that provides the information necessary for an objective, independent review thereof. Id. This principle remains valid even where the decision on appeal is predicated upon a determination made by another Interior Department agency vested with the authority to do so. Thus, to the extent that BLM relied on recommendations received from BIA or the Navajo Nation

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<sup>4/</sup> The regulations in 25 C.F.R. Part 211 were revised in 1996. 61 Fed. Reg. 35653 (July 8, 1996). Unless otherwise noted, this opinion refers to the 1995 regulations in effect when BLM issued its Decision.

to carry out its mandate, BLM was obligated to ensure that the recommendations it decided to accept were adequately supported, and to articulate and document its decision-making in the record.

Regulation 25 C.F.R. § 216.1 states that it is the policy of the Department to encourage the development of mineral resources underlying Indian lands, and acknowledges that the "interest of the Indian owners and the public at large requires that, with respect to the exploration for, and the surface mining of, such minerals, adequate measures be taken to avoid, minimize, or correct damage to the environment \* \* \*." 5/ A mining plan is required by 25 C.F.R. § 216.7(a), and when revegetation is required as part of the reclamation goal, the plan must show the types and mixtures of grasses and the types and methods of planting to be employed. 25 C.F.R. § 216.7(c); 43 C.F.R. § 3592.2(c)(9). These provisions establish more than sufficient authority to require the use of a particular seed mix, the application of mulch, and the construction of fences if they are reasonably necessary to achieve reclamation.

ASSC counters that the seed mix in Stipulation No. 3 was merely recommended by BIA and thus it was error to treat it as a requirement. The seed mix was first suggested in the May 14, 1993, memorandum to BLM from the BIA Acting Area Director, in which deficiencies in the mining plan were noted. The BIA specified the desired seed mix as "native species of this geographic location." How and why BIA decided to recommend the disputed seed mix rather than another does not appear from the record, and there certainly is nothing in the record that discusses or explains the benefits of one mix or another, or why the dryland pasture mix used by ASSC was unacceptable or inferior to the BIA recommended mix.

In addition, however, ASSC claims that some of the seed species are too expensive and some are difficult to acquire, without identifying which seed species it is referring to, and further asserts that ASSC has successfully reclaimed using another seed mix. This very assertion was made to the Deputy State Director, who noted the argument in his Decision, and responded to it simply by reciting that BIA and the Navajo Nation had furnished recommendations which were incorporated into the mining plan.

ASSC admits that it has not been totally successful in its reclamation efforts, but asserts that this is attributed to the lack of rain and not to the quality or appropriateness of the seed mix. ASSC's mining plan does not identify the seed mix ASSC would use, beyond generally identifying it as a native grass seed mix. 6/ The record shows, however, that the

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5/ Regulation 25 C.F.R. § 216.2(c) states the regulations in this part apply only to permits issued subsequent to the date on which the regulations became effective, but as discussed earlier, the regulations are made applicable to ASSC's permit by reason of section 8 thereof.

6/ ASSC states that it will specify the seed mix to be used, but as noted, 25 C.F.R. § 216.7(c) requires the mining plan to identify the types and mixtures of grasses to be planted, as well as the types and methods of planting and the amount of grasses per acre.

seed mix used by ASSC in the past was a dryland pasture mix consisting of Lincoln Smooth Brome, Crested Wheatgrass, Tetraploid Perennial Ryegrass, Intermediate Wheatgrass, Ephraim Crested Wheatgrass, Annual Ryegrass, and Western Wheatgrass. (July 27, 1989, Inspection Report.) The record also contains an undated letter to BLM from James Burkewitz, General Manager of ASSC, which was sent sometime in June 1993, in which Burkewitz states that he spoke to an unidentified extension representative and was informed that "what [ASSC] had growing out there was all that would grow."

Section 3042 of the BLM Manual, as supplemented by Handbook H-3042-1 (Handbook), provides information and guidance on land reclamation and general performance standards. The provisions of the BLM Manual do not have the force and effect of law; nevertheless, as this Board has held on numerous occasions, they are binding on BLM. Howard B. Keck, Jr., 124 IBLA 44, 55 (1992), and cases cited therein.

The Handbook also establishes general guidelines for seeding, including criteria to be used in selecting a seed mix. These general considerations in determining seed mixes include obtaining recommendations for species selection from BLM and the Soil Conservation Service of the Forest Service. (H-3041-2, Ch. 12, F. 1.) BIA is not identified, but it would be appropriate to obtain recommendations from the Navajo Nation and BIA, given the spirit of the MOU and the benefit of their familiarity with the locale and site. If a particular seed mix is to be required for reclamation based upon the advice or recommendations provided by the Navajo Nation and BIA, it must be explained and supported in the record. Here, the record is devoid of a supporting rationale for requiring the mix specified in the stipulation, and while we assume that the disputed mixture fully satisfies the Handbook criteria, the issue is whether ASSC's mixture also meets those criteria in whole or in part, and if so, what provided the basis for selecting one rather than another.

We note, moreover, that the Handbook lists the availability of seed from commercial seed suppliers as one of the criteria for determining the appropriateness of selecting a plant species, whereas ASSC asserts that some of the seed is not readily available, <sup>7/</sup> an allegation that is not treated in the Decision, apart from noting the argument, or in the record. Thus, there is no discussion or comment as to why the mix used by ASSC in the past cannot be used, or any response to ASSC's assertion that it has successfully reclaimed using the seed mix it prefers. Consequently, the statement that the Authorized Officer must consult with the agency having jurisdiction over the surface of the land, even coupled with the conclusion that BLM may require reseeding with a particular mix, clearly does not provide the requisite rationale for the Decision.

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<sup>7/</sup> ASSC also asserts that some of the species are expensive. The BLM Handbook does not include cost as a criterion. Even so, we observe that cost often is a function of availability, and we can easily conceive of scenarios in which cost could well become an issue.



The record contains quarterly Inspection Reports of the site beginning in 1988. These reports include observations regarding, among other things, the status of reclamation efforts, and provide some support for ASSC's assertion that it has achieved a degree of success in reclamation, bearing in mind that the issue is whether the reclamation goal expressed in the plan has been achieved. As stated in ASSC's mining and reclamation plan, the goal is "to establish a permanent vegetative cover that is diverse, self-generating and promotes soil stabilization." (Mining Plan at ¶ J.) The quarterly Inspection Reports reveal the following.

The Inspection Report of October 3, 1989, characterizes the reseedling as "somewhat successful." The Report of October 19, 1989, notes that revegetation was established in the "knoll area" (apparently the South Knoll) and appeared to be in acceptable condition, with no rilling.<sup>8/</sup> However, elsewhere the reclamation was deemed inadequate with unacceptable slopes, depressions, and rilling. The presence of dirt bikers and grazing horses was noted as well. A year later, approximately 100 acres had been disturbed, and in the December 6, 1990, Inspection Report, the South Knoll was again described as becoming reestablished. That Report also noted that the rilling west of the knoll had not increased, and may have been stabilized by the vegetation. The February 21, 1991, and May 23, 1991, Inspection Reports noted that sparse vegetation had been reestablished on the South Knoll. On March 15, 1990, the South Knoll remained in satisfactory condition according to the Inspection Report for that date, although a gully had developed, a new pit had been opened, and there was no evidence of reclamation activity that day. ASSC thus seems to have achieved at least part of its reclamation goal at the South Knoll.

Other areas appear not to have fared as well, however, as reflected by the October 26, 1993, report, which stated that vegetation had not grown back very well and that gullies were beginning to form. Photographs of the area were attached to the report which confirm this observation. In contrast, the April 22, 1993, report stated that previous reseedling efforts involving the broadcasting of a dryland grass mix had had limited results and recommended the use of a seed drill, but made no mention of utilizing a different seed mix.

Ascertaining ASSC's success in reclaiming disturbed areas is made more difficult by what appears to be some ambivalence on the part of representatives of the Navajo Nation toward ASSC. Thus, an October 4, 1989, Conversation Record contains a note to the effect that the tribe was "dissatisfied" with the manner in which Appellant conducted mining, yet the Navajo Minerals Department was "reluctant" to encourage any action that could jeopardize the operation, because it employed 23 area residents on a long-term basis. The May 30, October 23, and November 9, 1989, and June 6, 1990, Conversation Records similarly suggest a degree of frustration, if not reluctance, on the part of the Navajo Environmental Protection Agency (EPA) in taking the steps necessary to obtain consistent, satisfactory

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<sup>8/</sup> A "rill" is defined in the BLM Handbook as "a small erosive feature caused by the channeling of water on slopes." (H-3042-1, Glossary at 8.)

progress on reclamation, a sense also conveyed by correspondence from BLM to the Navajo EPA dated November 15, 1989, and to ASSC dated March 19 and July 6, 1990, for example.

Moreover, grazing of the reseeded areas has been a persistent barrier to successful revegetation. For example, the May 16, 1989, inspection reported horses grazing north of a newly seeded area, while the October 19, 1989, report also noted horses grazing in reseeded areas and dirt bike tracks over the area. The September 26, 1990, Inspection Report at 2 acknowledges that "[t]he area is being grazed, which makes revegetation difficult. Fencing is not desired by residents, according to those present [representatives of ASSC, the Navajo Minerals Department, BIA, and BLM], and if put up would most likely be removed." During the inspection of December 6, 1990, revegetation of the South Knoll was proceeding, but it was noted that grazing permittees continued to graze the area. The general tone of the report suggests that reclamation was proceeding in a satisfactory manner, and that the disturbed acreage was successfully being reduced from 100 acres to 10 acres. The February 21 and May 23, 1991, Inspection Reports include the observations that sparse revegetation was reestablished on the South Knoll in spite of grazing. At the December 17, 1991, inspection, all but the northwest pit area had been reclaimed and revegetation with sparse grass was noted. The report also contained the notation that the tracks of domestic livestock were observable "all around the area." As previously noted, in paragraph 4 of its June 13, 1994, comments on the proposed mining plan, the Navajo Nation stated "reclamation will never be successful if grazing and access to the reclaimed areas are not controlled."

The 1992 Inspection Reports contain no commentary pertaining to the progress of reseeded or revegetation. However, when the claim was inspected on October 26, 1993, it was noted that revegetation was not progressing well and that gullies were forming. Inspections in 1994 were principally concerned with ASSC's encroachment on an archaeological site, with concerns expressed regarding the stockpiling of top soil. The record includes numerous photographs of the site, but these are not especially helpful in judging ASSC's claim that it has successfully reclaimed areas within the permit site using a different seed mixture. Regardless of whether we are able to ascertain the degree of success achieved using the dryland pasture seed mix, in our view the record does not reveal why BLM accepted the seed mix suggested by BIA rather than ASSC's mix or another mix, and the Deputy State Director's Decision did not respond to ASSC's factual contentions. Thus, we conclude that BLM's Decision as to Stipulation No. 3 should be set aside and the case remanded to BLM.

In challenging Stipulation No. 4, which requires mulching of the reseeded area, ASSC asserts that it has successfully reclaimed without the use of mulch. The Handbook notes that the application of mulch or erosion netting may be necessary to reduce surface soil movement and promote revegetation. (Ch. I, D. 6(b).) Whether to use mulch is to be decided on a site-by-site basis, because mulching that is crimped into the soil on dry sites can draw moisture out of the soil in some conditions. See Ch. XII, I of the Handbook.

Mulching was recommended by the BIA in its May 14, 1993, comments on the plan. The record also includes an April 15, 1982, Navajo Nation memorandum discussing mulching material. Both documents appear to proceed from a foregone conclusion that mulching should be required, but neither explains or analyzes the requirement. As stated, rilling was noted as a problem in some of the quarterly Inspection Reports (see reports of Oct. 19, 1989, March 15, 1990), which certainly suggests a basis for the requirement. However, as noted above, the record also provides support for ASSC's claim that it has achieved some degree of success in reclamation without mulching. We assume that ASSC in fact reduced the disturbed area from 100 acres to 40 or less acres without mulching, which clearly suggests that ASSC's claim is not without merit. Again, the Deputy State Director's Decision does not address ASSC's contention or state the basis for concluding that it should be required. Accordingly, we conclude that BLM's Decision as to Stipulation No. 4 should also be set aside and the case remanded to BLM.

[3] In regard to the fifth stipulation requiring fencing, ASSC argues that the regulations cited by BLM in support of its authority to require ASSC to erect fences to protect seeded areas, 25 C.F.R. § 211.24 (1995) and 43 C.F.R. § 3592.1(c)(10), do not in fact confer such authority, and that no such regulatory requirement exists. (SOR at 5.) ASSC notes that 43 C.F.R. § 3592.1(c)(10) requires the submission of the method "proposed to protect unmined recoverable reserves and other resources, including the method proposed to fill in, fence or close all surface openings which are a hazard to people or animals." (SOR at 5 (ASSC's emphasis).) ASSC further notes that 25 C.F.R. § 211.24 provides only that the lessee shall return the leased premises in good order and condition. Finally, ASSC states that it "has informed BLM numerous times that fencing the entire area is not feasible, in part, because fencing, once in place, is removed by persons not affiliated with ASSC" and also that it has fenced areas in the past only to have the fence removed shortly thereafter. (SOR at 6.)

We agree with ASSC that 43 C.F.R. § 3592.1(c)(10) does not authorize BLM to order the erection of fences to protect reseeded areas. Instead, the regulation pertains to plan requirements when operations are abandoned, which is not an issue in this appeal. The other regulation cited by BLM, 25 C.F.R. § 211.24, requires the surrender of leased premises in good order and condition upon expiration of the term thereof or upon surrender of the lease, which is also not relevant here. If BLM determines that fencing should be erected in order to ensure that reclamation is successful, thereby ensuring that the land will be surrendered in good order and condition, it may require a stipulation to that effect in the plan as a result of its general authority to approve mining and reclamation plans, 43 C.F.R. § 3592.1(a), which requires that plans shall provide for the reclamation of the surface of the lands affected by the operation. Additional authority may be found at 43 C.F.R. § 3591.1(b), which requires that the surface shall be reclaimed and that damage to vegetation shall be repaired. Regulations at 25 C.F.R. §§ 216.1 and 216.7, governing surface mining on Indian lands, require that measures shall be taken to avoid,

minimize, and correct damage to the environment, and also require an approved mining plan which, among other things, provides for reclamation of the lands disturbed by mining operations. ASSC's arguments to the contrary are rejected.

The BLM Manual Handbook also recognizes that a reclaimed landscape may require protection to ensure successful reclamation. (Handbook H-3042-1, Ch. I, D. 9.) The Handbook does not specify how that protection is to be achieved, though fencing is an obvious choice. However, ASSC asserts that fencing is not necessary to ensure successful reclamation and argues that the proof of its claim is that it has successfully reclaimed already. While the evidence supporting ASSC's claim that it has successfully reclaimed certain areas within the permit site is not free of question, ASSC over the years apparently has reduced the disturbed acreage from 100 acres to 40 or fewer acres. At the very least, BLM should fully explain its reasoning.

Even if we were able to conclude that the record clearly shows that fencing is a reasonably necessary stipulation, nothing in the record explains why a 2- to 4-year period to maintain the fences was selected. In a September 4, 1990, memorandum to the File, a BLM geologist from the Division of Mineral Resources noted that in a meeting on the mining plan with BIA and the Navajo Nation there was a suggestion that newly reseeded areas be fenced for 1 year or 2, providing it did not interfere with grazing permittees. By May 14, 1993, BIA was recommending protection of seeded areas from grazing livestock for 2 to 4 years. This presumably was the result of a reasoned determination, but there is nothing in the record to show that it was, or to contradict ASSC's argument that, based on its experience, 1 to 2 years is adequate.

The more fundamental issue is whether fencing could, in the actual circumstances at hand, serve as a means of ensuring successful reclamation of the area. ASSC alleges that in the past fencing has been removed by unknown persons, and that the only way to ensure that fencing remains in place is to guard it. ASSC's contentions are well-founded, because the record contains a number of memoranda and Inspection Reports in which it is noted that grazing permittees do not want fences or interference with their grazing activities. (E.g., September 4, 1990, BLM Memorandum to the File; April 22, 1993, Inspection Report.) Indeed, one report acknowledged that if fencing were put up, it likely would be removed because the residents did not desire it. (Sept. 26, 1990, Inspection Report.) Similarly, the Navajo Fish and Wildlife Department stated in its April 1992 Threatened and Endangered Species Survey and Evaluation that attempts should be made to ensure reseeding is successful and that this could include fencing the area and informing the locals of the importance of limiting grazing in these areas for a period of time.

In the same vein, the April 22, 1993, Inspection Report noted that in discussions during the inspection it was recommended that reclaimed areas (i.e., newly reseeded areas) be fenced off, but also noted that this had not been done in the past because the locals objected to it. A May 14, 1993, memorandum from BIA to BLM on deficiencies in the mining plan sought

protection of seeded areas for 2 to 4 years after establishment of vegetation. This memorandum did not specify fencing, stating only that protection by any means necessary was desired. The record also shows that ASSC complained that its fences and markers had been taken down by unknown persons. (July 20, 1993, Inspection Report; Letter from BLM to ASSC dated March 18, 1994.) In any event, the record lacks a clear explanation of how BLM reached its decision to require fencing for 2 to 4 years. In such circumstances, it is appropriate to set aside the Decision and remand the matter to BLM.

We wish to emphasize that we do not hold or suggest that BLM cannot require ASSC to agree to the stipulations here at issue. To the contrary, we decide only that the present record does not explain or adequately document the facts BLM relied on or the reasons why ASSC's alternatives are not acceptable.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Decision appealed from is set aside and the case is remanded to BLM for issuance of a decision that comports with this opinion.

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T. Britt Price  
Administrative Judge

I concur.

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John H. Kelly  
Administrative Judge

